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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RONALD VANDERHEIDEN, Plaintiff and Appellant, v. CITY OF ALAMEDA, Defendant and Respondent.	A120169 (Alameda County Super. Ct. No. RG-06-283619)

Plaintiff Ronald Vanderheiden[1] worked as a firefighter for the City of Alameda (City) for more than fourteen years before he was terminated on grounds that he was psychologically unable to work as a member of a firefighting team. He sued under the Fair Employment and Housing Act (FEHA), and alleged discriminatory discharge, failure to accommodate, and failure to engage in an interactive process to identify a reasonable accommodation under Government Code section 12940, subdivisions (a), (m) and (n).[2]

The case involved the termination of an employee who was "regarded as" having a mental disability which prevented him from performing the essential duties of his job. And the City obtained summary judgment on the grounds that, although the City "likely" did regard Vanderheiden as mentally disabled, Vanderheiden failed to engage in good faith in the interactive process, failed to request a reasonable accommodation, and failed

[1] Vanderheiden's surname appears variously in that form and as "Vander Heiden" and "Vander-Heiden." We adopt "Vanderheiden," except when quoting portions of the record verbatim.

[2] All statutory references, unless otherwise indicated, are to the Government Code.

to produce evidence that he was not disabled and could perform the essential duties of his job.

Vanderheiden contends he is not mentally disabled and is fully capable of performing his duties as a firefighter, and in essence claims he was frozen out of his job by coworkers who ostracized him and complained about him to superiors after he filed a complaint with the police against a fellow firefighter. He claims his superiors, who could not resolve the conflict between Vanderheiden and his fellow firefighters, took the side of the majority and erroneously declared him mentally unbalanced and unfit for the job.

We agree with Vanderheiden that there are genuine issues of fact regarding his psychological health and his ability to perform his job. We thus reverse.

FACTUAL BACKGROUND[3]

Vanderheiden began working as an Alameda firefighter in June 1989. During the ensuing years he received letters of commendation on several occasions, including comments from the fire chief that he provided "an excellent example of teamwork, cooperation, and fire attack coordination," that he exhibited "the most professional maximum effort" that the chief had "ever observed in [his] entire career with the Alameda Fire Department," and that his performance on one rescue operation was "stellar." Nevertheless, in February 2003, an unfortunate incident with a coworker dramatically changed his life and his career.

On February 4, 2003, Vanderheiden was working with fellow firefighter Jeff DelBono. They responded to an emergency call in which the patient had defecated on

[3] The facts we recite are not undisputed. Practically everything in this case is disputed, including the relevance and admissibility of the evidence presented by both parties. Although both parties filed objections to the evidence offered by the other, the trial court did not rule on the objections. For that reason, all of the parties' submissions will be considered by us in reviewing the court's ruling. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566, 578-579.) Where, as here, summary judgment has been granted to the defendant, we must view the evidence in the light most favorable to plaintiff. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97.) Therefore, we generally recite the facts in a manner favoring Vanderheiden's evidentiary submissions.

herself. While transporting the patient, DelBono got feces on his pants and blamed Vanderheiden.

Later that morning, the two firefighters responded to another emergency involving a patient who was not breathing and possibly had hepatitis. While DelBono was attempting to put a tube down her throat to assist her breathing, he splashed emesis (i.e., vomit, bile and other bodily fluids) on Vanderheiden's chest and face several times, and the emesis entered Vanderheiden's mouth and eye. Vanderheiden thought DelBono had intentionally aimed the emesis in his direction in retaliation for the earlier incident. The two got into an argument when they were back at the fire station.

Vanderheiden complained to his union president with no satisfaction. He subsequently filed a written complaint about the incident with the administration of the fire department (Department).[4] Concerned about the biohazard, Vanderheiden also filed a criminal complaint with the police, which was investigated as a violation of Penal Code section 243, subdivision (c), but no charges were filed.[5] As a result of the incident both men were placed on administrative leave.

Vanderheiden claims he soon began receiving harassing phone calls. Vanderheiden returned to work briefly on February 20 and claims he received a cool reception from his coworkers. He discussed the matter with Fire Chief James Christiansen, who told him, "You're like a man on an island, you're all alone here." Vanderheiden was again put on administrative leave two days later because the union objected to his being allowed to return to work before DelBono was.

In April 2003, the Department hired Peter Sarna, a retired public safety officer, to conduct an independent investigation into the DelBono incident. The results of that investigation are not in the record, but Vanderheiden was not disciplined.

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[4] A copy of the written complaint is not contained in the record. Exhibit 4 to Vanderheiden's declaration, purportedly a copy of that complaint, is in fact a different document.

[5] The district attorney's report indicated if a similar incident were to occur within the next twelve months, the case would be reopened and prosecuted along with the new charge.

Vanderheiden and DelBono both again returned to work in late June 2003, and were assigned to different fire stations and different shifts so they would not have to work together. Although he was working at a different station with firefighters who had not been involved in the DelBono incident, from the beginning there was tension between Vanderheiden and his fellow firefighters who, he claims, ostracized and isolated him. For instance, Vanderheiden said that when he would walk into a room, crew members would immediately vacate the area and refuse to acknowledge him. A captain told him he should not attend the annual union ski trip because it would not be safe for him to do so. He was told by Chief Christiansen that if he continued to serve as an instructor in the water rescue program, other firefighters might leave the program. He stated that one captain announced to a class that he never wanted Vanderheiden in his station or on his rig, and that a fellow firefighter went from station to station calling Vanderheiden a "dead man."

Vanderheiden also claims that his locker was vandalized, his name tags snapped in half, and two homemade bombs planted on the front porch of his house. When he complained to Chief Christiansen, he was told he was in that position because he had gone "outside of the department" when he reported DelBono to the police. In July 2003, Vanderheiden asked to be assigned to administrative duties to alleviate the tensions, but his request was denied.

In October or November 2003, the City proposed a mediated meeting among DelBono, Vanderheiden, a union representative, and DelBono's attorney. Vanderheiden declined to participate because he wanted to discuss the February 4 incident, but he was told that such a discussion would be off limits. The City wanted to focus on building better relationships moving forward.

From the City's perspective, the problem was not that Vanderheiden was ostracized by his coworkers, but that Vanderheiden's own behavior became "problematic and disruptive" after he returned to work in June 2003. The City claims Vanderheiden called a station meeting in which he put other employees "on notice" that they should leave him alone. He told fellow employees that he was taking notes on their statements

and actions, and when he spoke to management personnel he sometimes requested permission to tape record the conversations.

The City also contends Vanderheiden was subject to mood swings, sometimes appearing depressed or frustrated, and at others seeming overly animated and volunteering for too many assignments. On two or three occasions Vanderheiden appeared unannounced at the homes of at least two different division chiefs, wanting to talk about the DelBono incident and claiming he did not feel "vindicated." Vanderheiden had also called in sick for 160 hours in the possible 1200 work hours available to him from June to November 2003.[6]

Vanderheiden reportedly isolated himself inside the firehouse, took naps during the day, stared for long periods at other employees, eavesdropped on the conversations of others, and engaged in "manipulative" behavior by lying, "playing the victim," bypassing the chain of command, or pitting other employees against each other.[7] Vanderheiden also complained to a superior about the two homemade bombs on his front porch, but later "changed his story," saying the bombs had actually exploded and blown up his front porch.

According to the City, complaints about Vanderheiden's behavior escalated to the point that other members of the Department feared he was going to harm himself or others. Other firefighters also expressed safety concerns about working with Vanderheiden, given that they must depend on each other for their very lives.

On November 14, 2003, Vanderheiden, while on duty, woke up the duty chief and, while crying, said "I cannot go on like this . . . [T]his issue must stop." He was sent home on sick leave because he was "too emotional to work." He called in sick on November 16, and was again placed on administrative leave on November 21, 2003. It was a leave from which he would never return.

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[6] Excessive absence has not been cited by the City as the reason for his discharge.

[7] A fire captain told Vanderheiden in September 2003 that the crew members had requested that he not engage in small talk with them and had complained that he took too many naps, volunteered for too many assignments, and cooked too much.

The City insisted that Vanderheiden receive psychological counseling through the Employee Assistance Program (EAP) before he could return to work. Vanderheiden claims he met with Chief Christiansen in mid-December and again requested that he be assigned to administrative duties. Again his request was denied.

In January 2004, Vanderheiden wrote a letter to Chief Christiansen setting forth his objections to the mandatory EAP referral. The letter was materially consistent with his claims in this lawsuit in that it described the ostracism he had experienced and many of the incidents described *ante*. It also described Vanderheiden's efforts to be a team player by taking on extra duties around the fire station, as well as by helping out at a Department-sponsored pancake breakfast and a children's Christmas party. Yet, Vanderheiden said he was criticized by his captain for "asking too many times if people needed assistance with projects" and "trying to [*sic*] hard."

Vanderheiden had seen Dr. Judith Brown, a clinical psychologist, shortly after the DelBono incident and began seeing her again under the EAP. He also saw Dr. Nils Hagberg, Ph.D, MFT, on four occasions in January and February 2004. Both psychologists wrote "To Whom It May Concern" letters on Vanderheiden's behalf in February and March 2004. Neither diagnosed him with a psychological impairment, but both advised that he should not work with DelBono. Dr. Brown opined that Vanderheiden was "quite ready to return to work (and has been ready for some time now)." These letters were not immediately produced to the City, but they were made available ten months before he was terminated. (See fn. 12, *post*.)

In early March 2004, Chief Christiansen decided that Vanderheiden should be allowed to return to work, but the crew at the fire station complained. Christiansen met with crew members on March 30, 2004, to discuss their concerns, which he testified were based on issues of their safety. Vanderheiden was not advised of the outcome of the meetings and remained on administrative leave.

In May 2004, the City authorized psychologist Gene Grossman to assist in a conflict resolution process. He conducted individual interviews with Vanderheiden, DelBono, and others in an effort to help everyone move past the February 2003 incident.

His efforts, which Vanderheiden describes as being primarily aimed at convincing him to retire, were unsuccessful.

By late August 2004, Vanderheiden had hired an attorney who was negotiating with the City about a possible industrial disability retirement or a workers' compensation claim. The parties disagree as to whether Vanderheiden wanted or did not want to pursue either of those options. In mid-September, the City filed an "Employer's Report of Occupational Injury or Illness" on Vanderheiden's behalf, alleging his "medical diagnosis" as "post-traumatic stress injury." Vanderheiden claims he did not want to file a workers' compensation claim because there was "nothing wrong" with him, and ultimately he did not pursue either that claim or an industrial disability retirement.

On November 23, 2004, Vanderheiden was ordered to undergo a fitness for duty evaluation because his "supervisors and coworkers have observed wide mood swings, incidents of [Vanderheiden's] 'staring down' other members, periods of crying at work and other behaviors that raise concern for [his] well-being and their safety."

As ordered by the fire chief, Vanderheiden saw Dr. Diana Everstine in January 2005. He claims she interviewed him for about an hour but took personal phone calls during the session and left for an extended period to walk her dog. As a result of these interruptions, Vanderheiden claims Dr. Everstine spent only about 20 minutes actually interviewing him, whereas her records indicate she spent four hours. Vanderheiden also claims Dr. Everstine said she was a long-time friend of the City's attorney, Linda Tripoli, which led him to conclude she might be biased. Dr. Everstine's typewritten notes (which occupy one page) indicate that she spent six hours reading the Sarna report and some of the parties' correspondence, as well as supervisors' notes, e-mails, and forms rating Vanderheiden's performance.[8]

[8] Dr. Everstine originally produced no records underlying her opinion to either the City or Vanderheiden, as Vanderheiden had refused to sign a release. He eventually signed a release, and one additional typewritten page was produced to both parties in December 2005. However, the additional page reveals no details of the interview or Dr. Everstine's observations backing up her opinion. It simply lists the documents Dr. Everstine reviewed and the psychological tests that were performed on Vanderheiden.

Dr. Everstine's husband, Louis Everstine, Ph.D., performed psychological tests on Vanderheiden, which purportedly consumed twelve hours. Vanderheiden claims that a radio was left blaring in the room while he took the tests. The actual test data or a summary of their results are not included in the record.

On February 16, 2005, Dr. Diana Everstine wrote a memorandum concluding that Vanderheiden had "become so suspicious and inappropriately angry toward the Administration of the Department, as well as many of his fellow firefighters, that he is no longer capable of working as part of a team, nor can he function in a positive way as a member of this organization." She concluded he was "not psychologically able to work as part of a team in the City of Alameda Fire Department."

Her memorandum refers to an "in-depth, outside investigation of the facts of the incidents in question," which concluded there was "no basis for Mr. Vander-Heiden's claims against other firefighters." This would appear to be a reference to the Sarna report, not an investigation into the informal accusations that Vanderheiden made against other members of the Department after he returned to work. Because the Sarna investigation determined "no basis" for Vanderheiden's claims in the DelBono incident, Dr. Everstine concluded that Vanderheiden's "problems" "working as part of a team" were due to an "emotional overreaction to the events in question." Her memorandum gave no diagnosis of a specific mental disorder.[9]

On February 18, 2005, Chief Christiansen wrote to Vanderheiden reporting Dr. Everstine's conclusion that he was psychologically unfit to return to his job. Vanderheiden was placed on sick leave instead of paid administrative leave, and at the end of March was put on federal Family and Medical Leave. He was told that the City would arrange for a re-evaluation by Dr. Everstine if Vanderheiden submitted information from his doctor that "the condition rendering [him] psychologically unable to work" had improved sufficiently to make it likely he could perform his essential duties.

[9] Because Vanderheiden would not sign a release, Dr. Everstine's opinion was confined to "functional limitations" with respect to the job.

Vanderheiden saw psychologist Marc Miller on two occasions in March and April 2005. Dr. Miller concluded there was "no psychological reason for this man not to return to his position as a fireman."

In May 2005, Vanderheiden also saw a psychiatrist in Maryland, Dr. Richard Epstein, M.D., and his colleague, psychologist Donald Soeken. Neither found any psychological condition that would prevent Vanderheiden from performing his duties as a firefighter.

Dr. Epstein opined that Vanderheiden had suffered "adjustment disorder with mixed features of mild anxiety and depression" that had lasted "about six months" after the DelBono incident but had since "completely resolved." He found "no clinical evidence of any psychiatric or emotional disorder that would interfere with his usual duties as a fireman and EMT."[10] In fact, Dr. Epstein called Vanderheiden "a resilient and mentally robust individual who has handled extreme stress in the work-place without suffering from clinically significant symptoms or impairment in his ability to function in his job."[11]

In addition to reviewing other psychological reports, Dr. Soeken conducted a six-hour face-to-face interview with Vanderheiden, had several phone conversations with him, and reviewed "written material about Mr. Vander-Heiden from the fire department." Dr. Soeken opined that Vanderheiden "has always been fit for duty" and "has never been mentally ill."

Given that Drs. Diana and Louis Everstine were the only mental health professionals who believed Vanderheiden suffered from a mental illness, Dr. Soeken suggested they might be biased. Beginning in June 2005, Vanderheiden's lawyer requested that a psychologist other than Dr. Everstine be allowed to conduct a return to work evaluation on that basis. The City refused.

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[10] Emergency Medical Technician, hereinafter "EMT."

[11] In addition to Dr. Epstein's one-page letter summarizing his conclusions, the record contains four pages of Dr. Epstein's handwritten notes, as well as his curriculum vitae.

All of the foregoing psychological reports were available to the City before Vanderheiden was terminated.[12] The City did not regard them as providing significant new information to warrant a re-evaluation by Dr. Everstine. The letters from Drs. Brown and Hagberg were considered irrelevant because they pre-dated Dr. Everstine's evaluation. The report by Dr. Miller was deemed insufficient to warrant a re-evaluation because Dr. Miller had not specifically addressed the opinion prepared by Dr. Everstine, and it was not clear that he had considered the complaints of other firefighters about Vanderheiden's behavior.

The reports by Drs. Epstein and Soeken were discounted because they practice in Maryland rather than California. The City also considered Dr. Epstein's statement that Vanderheiden's adjustment disorder had lasted only about six months inconsistent with the Department's observation that Vanderheiden "displayed inappropriate behaviors . . . through November of 2003," more than nine months after the DelBono incident. The Department also found it "troubling" that Dr. Epstein's report "contradicts and expressly disagrees with the findings of one of [Vanderheiden's] own therapists." This contradiction evidently relates to Dr. Epstein's conclusion that Vanderheiden had not suffered from nightmares following the DelBono incident (which possibly would have indicated post-traumatic stress disorder), whereas a previous unidentified therapist had reported nightmares.[13]

On September 21, 2005, Chief Christiansen sent a notice of his intent to terminate Vanderheiden because he was "psychologically unable to work as part of a team." Christiansen included copies of documents, including a job description that a firefighter

[12] On June 7, 2005, Vanderheiden's attorney provided to the City the letters from Drs. Miller, Hagberg, and Brown. On June 28, 2005, he sent the City Dr. Epstein's opinion, and in November 2005, produced Dr. Soeken's report. In January 2006, counsel produced Dr. Epstein's handwritten notes and curriculum vitae, as well as a two-page initial evaluation by Dr. Miller.

[13] Vanderheiden had never remembered having nightmares but reported to his former therapist that his wife told him he had suffered from nightmares. Dr. Epstein interviewed Vanderheiden's wife and concluded she was mistaken.

must have the "[a]bility to . . . function as an effective group or team member" and to "establish and maintain effective working relationships with employees and the general public."[14] After a hearing under *Skelly v.State Personnel Board* (1975) 15 Cal.3d 194, Vanderheiden was terminated by letter dated April 10, 2006. The stated reason was that he was "psychologically unable to work as part of a team in the Alameda Fire Department."

PROCEDURAL BACKGROUND AND TRIAL COURT'S RULING

On October 11, 2006, Vanderheiden filed a first amended complaint alleging: (1) discriminatory discharge based on the City's perception that he was mentally disabled, (2) failure to accommodate, and (3) failure to engage in an interactive process to identify a reasonable accommodation. (§ 12940, subds. (a), (m) & (n).)

The City moved for summary judgment on grounds that (1) Vanderheiden could not prove the City "regarded him" as mentally disabled under the FEHA; (2) the City had engaged in good faith in any interactive process required of it; (3) the City had offered Vanderheiden a reasonable accommodation; and (4) Vanderheiden could not perform the essential duties of a firefighter.

On August 15, 2007, the trial court granted the City's motion, with judgment entered October 26, 2007. Although the court found it "likely" the City did regard Vanderheiden as mentally disabled, it granted summary judgment to the City because Vanderheiden had presented insufficient evidence that he could perform the essential functions of the job. The court found no genuine factual dispute that the City had engaged in good faith in the interactive process, while Vanderheiden had not.

The court pointed out that Vanderheiden had not requested a reasonable accommodation except in July 2003 "and possibly December 2003," and that these requests, "if made, occurred prior to any determination that Plaintiff was 'not psychologically able to work' and, thus, prior to Defendant 'regarding' him as disabled.

[14] The job description included several functions specifically identified as "essential duties." The ability to function as a team member is not listed in that section, but Vanderheiden has not claimed that teamwork is not an essential duty.

Accordingly, at the time the alleged requests were made, Defendant was under no legal obligation to engage in an interactive process or reasonably accommodate plaintiff."

Because Vanderheiden had consistently denied he was disabled and insisted he did not need a reasonable accommodation, the court found Vanderheiden "did not in good faith engage in the process or respond to requests for reasonable accommodation discussions in a manner that enabled Defendant to adequately determine how to best assist" him. The court stressed that Vanderheiden, as well as the City, had an obligation to participate in good faith, and that he "must undertake reasonable efforts to communicate [his] concerns, and make available to [the City] information which is available, or more accessible" to Vanderheiden. It concluded that Vanderheiden had "thwarted" the City's attempts to meet its legal duties under the FEHA and "cannot now benefit from his failure to act in good faith prior to his termination."

On the discriminatory discharge claim, the court said simply, "Ultimately, Defendant found that Plaintiff could not perform the essential functions of his position because he was psychologically unfit and no reasonable accommodation existed. Plaintiff is without sufficient evidence demonstrating otherwise."

Although summary judgment was entered against him on all three causes of action, Vanderheiden challenges on appeal only the judgment on the discriminatory discharge claim.

DISCUSSION

I. The Legal Standards

The FEHA makes it illegal "[f]or an employer, because of the . . . mental disability . . . of any person, . . . to discharge the person from employment . . . ." (§ 12940, subd. (a).) The act "does not prohibit an employer from . . . discharging an employee with a . . . mental disability, or subject an employer to any legal liability resulting from . . . the discharge of an employee with a . . . mental disability, where the employee, because of his or her . . . mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that

would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." (§ 12940, subd. (a)(1).)

However, an employee need not have an *actual* mental disability to be entitled to protection under the FEHA. So, too, an employee with a *perceived* mental disability is also protected under the express language of the FEHA, which provides that " 'Mental disability' includes, but is not limited to, all of the following:

"(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.

"[¶] . . . [¶] (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult." (§ 12926, subds. (i)(1) & (i)(4).)

Vanderheiden has consistently denied that he has any mental disorder at all, much less one that prevents him from performing his job as a firefighter. Thus, he proceeds under the "regarded as" prong of the FEHA.

Ordinarily, a plaintiff with a mental disability establishes a prima facie case of disability discrimination by showing: (1) he suffers from a disability; (2) he is a qualified individual; and (3) he was subjected to an adverse employment action because of the disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254 [post-traumatic stress disorder].) However, the first and third prongs of the prima facie case may be established by showing that the employee was regarded or treated by the employer as having a disabling mental condition and that an adverse employment action was taken on the basis of that belief. (§§ 12926, subd. (i)(4), 12940, subd. (a); see CACI No. 2540.)

On a motion for summary judgment, " ' "[i]f the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. . . .*" ' [Citation.]" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344.)

Summary judgments are reviewed de novo. (*Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128.) Where, as here, summary judgment has been granted to the defendant, we must " 'view the evidence in the light most favorable to plaintiff[] as the losing part[y] and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at pp. 96-97.)

II. Summary Judgment Was Improperly Granted on the Discriminatory Discharge Claim

A. Even if Vanderheiden bears the burden of proving his ability to perform his essential job duties at trial, the City was required on summary judgment to show there was no triable material issue of fact on that point.

The City's motion for summary judgment on the discriminatory discharge claim was based on its assertion as undisputed facts that (1) the City did not regard Vanderheiden as disabled and (2) he could not perform the essential duties of the job. The trial court correctly found the City had failed to negate the first prong of Vanderheiden's prima facie case. "Based on the mental evaluation performed by Dr. Everstine and subsequently provided to Defendant, the evidence sufficiently demonstrates that Defendant likely 'regarded' Plaintiff as mentally disabled."[15]

With respect to the second prong, the parties disagree as to whether Vanderheiden had the burden to present evidence that he could perform the essential duties of the job. Vanderheiden relies on *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34 (*Gelfo*), to argue that he had no such burden, whereas the City relies on the more recent California Supreme Court decision in *Green v. State of California* (2007) 42 Cal.4th 254, 257-258 (*Green*), to argue that he does. *Green* settled a preexisting split of authority as to which party bears the burden of proof on the employee's ability to perform the

[15] This does not appear to be a summary adjudication of the issue in Vanderheiden's favor (and Vanderheiden made no motion), but rather an acknowledgment that the issue was a disputed fact subject to trial.

essential duties of the job, and in a four-to-three decision placed that burden on the employee. The City argues that *Green* is dispositive.

Vanderheiden, however, argues that *Green*'s holding does not apply if the employee is merely "regarded as" disabled. Indeed, *Gelfo* concluded in dictum that it is the employer, not the employee, who has the burden of proof at trial in such a case. (*Gelfo, supra,* 140 Cal.App.4th at p. 51, fn. 12.) *Gelfo* cited in support of this conclusion only CACI No. 2540. The current use notes for this instruction indicate that if the only claimed basis of discrimination is a "perceived disability," the element requiring proof that the plaintiff "was able to perform the essential job duties" should be "delete[d]." (CACI No. 2540 (Dec. 2008) Directions for Use, at p. 157.) This advice persists despite CACI's acknowledgment of the holding in *Green*. (CACI No. 2540, *supra,* at p. 157.) CACI cites no case authority for such an exception, however, and Vanderheiden likewise provides no reasoned analysis why a different burden of proof should apply in the case of perceived disabilities, as opposed to actual disabilities. And in any event, on summary judgment the City had the burden of showing there was no genuine factual dispute that Vanderheiden was unable to perform his essential duties as a firefighter. (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 964-965.) " '[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.' [Citation.]" (*Id*. at p. 965.)

But even assuming that *Green* implicitly overruled *Gelfo* on this point, Vanderheiden nevertheless produced enough evidence to avoid summary judgment.

B. The trial court placed undue emphasis on the City's compliance with its duty to engage in good faith interaction in granting summary judgment on the discriminatory discharge claim.

The trial court placed almost exclusive emphasis on the City's good faith interaction in trying to address Vanderheiden's perceived mental disability, and Vandeheiden's purported failure to reciprocate, concluding that Vanderheiden had

actually "thwarted" the City's efforts.[16] In particular, the court appears to have ruled against Vanderheiden in part because he allegedly failed to request an accommodation.[17] We agree, however, with Vanderheiden that when a plaintiff claims he suffers from no physical or mental impairment whatsoever and proceeds solely on a "regarded as" theory, he has no obligation to request an accommodation, at least in the context of a claim under section 12940, subdivision (a).

Gelfo held that an employer is required to provide accommodation to an employee whom it regards as disabled, and both parties are required to engage in good faith interaction to identify such an accommodation. (*Gelfo, supra*, 140 Cal.App.4th at pp. 54-62.) Thus, the trial court's attention to the interactive process was certainly warranted on the claims under section 12940, subdivisions (m) and (n). However, we disagree with the trial court to the extent it read *Gelfo* as holding an employee must invariably request an accommodation upon pain of sacrificing a claim under section 12940, subdivision (a) if he fails to do so. In a case proceeding on a "regarded as" theory alone, it would be incongruous to demand of an employee who claims he is perfectly able to perform the job without accommodation that he must nevertheless request an accommodation in order to receive a trial on a discriminatory discharge claim.

Beyond the failure to request accommodation, the trial court seems to have relied solely upon the City's good faith and reasonableness in keeping Vanderheiden on the payroll while it figured out how to solve its sticky personnel problem, as well as its ultimate reliance on Dr. Everstine's report as the basis for its decision to terminate him. As we will discuss, the City nevertheless may be subject to liability under section 12940,

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[16] We do not take as dim a view of Vanderheiden's participation in the interactive process as did the trial court. Vanderheiden, however, has now abandoned his claims of failure to accommodate and failure to engage, opting instead to pursue only the discriminatory discharge claim.

[17] Vanderheiden's declaration shows that he did request to be assigned to administrative duties in July and December 2003, but his requests were denied. The trial court found these were not cognizable requests for accommodation because they pre-dated Dr. Everstine's report.

subdivision (a), if it terminated Vanderheiden based on the perception that he was psychologically incapable of functioning as a firefighter if that perception was not objectively reasonable. This is a factual question subject to trial.

C. Vanderheiden's evidence created a genuine issue of fact regarding his ability to perform the essential duties of a firefighter.

The Supreme Court has observed that "the plaintiff's prima facie burden is 'not onerous' [citation]." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) To defeat a summary judgment motion, an employee need not prove by a preponderance of the evidence to the court's satisfaction that he or she was able to perform the essential functions of the job, but only that a reasonable trier of fact could reach that conclusion. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, & fn. 11.) Vanderheiden produced sufficient evidence to preclude summary judgment for the City.

Vanderheiden produced statements by four psychologists and one psychiatrist, none of whom diagnosed Vanderheiden with a mental or psychological disorder, and four of whom expressly opined that he was able to perform his duties as a firefighter. Dr. Brown said he was "ready to return to work." Dr. Miller found "no psychological reason for this man not to return to his position as a fireman." Dr. Epstein found "no clinical evidence of any psychiatric or emotional disorder that would interfere with his usual duties as a fireman and EMT." Dr. Soeken concluded that Vanderheiden "has always been fit for duty." Indeed, he further opined, "With all medical certainty Mr. Vander-Heiden is not mentally ill and has never been mentally ill. His removal from his position was arbitrary and the reason for removing him should not have been done for mental health reasons."

Given these opinions, we disagree with the trial court's conclusion that there was no genuine factual dispute on the issue of Vanderheiden's psychological ability to perform as a firefighter. The City contends that the five medical professionals who examined Vanderheiden may not have reviewed all of the background materials utilized by Dr. Diana Everstine, may not have performed the same psychological tests performed by Dr. Louis Everstine, and may not have taken into account all of the other firefighters'

complaints about Vanderheiden's behavior.[18] We also recognize that Dr. Everstine concluded that Vanderheiden was "psychologically unable" to perform his job functions in only one regard, namely that he was unable "to work as part of a team," while the other psychological opinions produced by Vanderheiden did not specifically address his teamwork ability. However, these factors do not invalidate the conclusions of Vanderheiden's mental health professionals or make them insufficient to create a factual dispute.[19]

The genuine factual issues relating to Vanderheiden's mental health and how it affected his ability to function as a firefighter are not properly resolved on summary judgment. The specific behaviors about which his crew members complained—such as "staring," "eavesdropping," and "manipulative" behaviors—are highly subjective, are not invariably associated with mental illness, and do not necessarily make one unable to perform as part of a team. Likewise, taking naps during the day cannot be regarded as a sure sign of mental illness. Vanderheiden explained his visits to division chiefs' homes as being unremarkable within the context of his pre-existing friendship with them, which had included going hunting and fishing together.

Vanderheiden's claim that two homemade bombs were found in front of his home appears to have been treated by the City as a paranoid delusion or an outright fabrication. Vanderheiden, however, has repeated the bomb allegation under oath, and the City

[18] Dr. Soeken's opinion specifically states that he reviewed "written material about Mr. Vander-Heiden from the fire department." Presumably these materials would have included some reference to the other firefighters' complaints.

[19] Dr. Epstein was educated at Yale, Washington University School of Medicine, Johns Hopkins Hospital, and the National Institute of Mental Health, with numerous publications and awards that lend his opinion special credibility. His detailed notes record his finding not only that Vanderheiden was "fit to return to work," but that he was a "very resilient and healthy individual" who "has handled extreme stress better than 95 percent of [the] population would."

disputes it.[20] If Vanderheiden convinces a jury this event actually occurred, that would certainly cast a different light on his mental health issues.

We also note that Vanderheiden had worked successfully as part of a firefighting team for the City for nearly fourteen years before the DelBono incident. The City claims his work history is immaterial. We disagree. That Vanderheiden functioned successfully as a team member before he was terminated raises an inference that he possessed no objectionable personality traits that fundamentally prevented him from engaging in successful teamwork. It further suggests that the difficulties experienced by the Department in putting the DelBono incident to rest may not have been entirely due to a psychological disability on Vanderheiden's part. Although we recognize that an individual may develop a psychological difficulty that would render him unable to perform duties that he previously was able to perform, we also cannot ignore the fact that Vanderheiden had demonstrated his ability to perform as a member of a firefighting team for many years prior to his termination.

Our view of the relevance of Vanderheiden's past performance is supported by caselaw. *Cook v. State of R.I., Dept. of MHRH* (1st Cir. 1993) 10 F.3d 17, 27-28 is illustrative, where the court found that the applicant's successful five-year work history with the same employer was a fact tending to support her claim that she was "otherwise qualified" for the job despite her obesity. In other cases, too, the fact that an employee had worked in the same field before or after being turned down for a similar job played a role in the court's decision that his or her ability to perform the job was a factual issue for the jury. (*Gillen v. Fallon Ambulance Service* (1st Cir. 2002) 283 F.3d 11, 31 [summary judgment for employer reversed where applicant for EMT position "succeeded in performing all the duties of an EMT with two other employers"]; *Holiday v. City of Chattanooga* (6th Cir. 2000) 206 F.3d 637, 640, 644 [summary judgment for employer reversed where HIV-positive applicant for job as policeman "had served as a police

[20] Vanderheiden described this incident to Dr. Epstein, saying "I had [a] plastic pipe bomb go off in front of my house." Dr. Epstein evidently did not regard this as an obvious delusion.

officer without any limitations on his ability to fulfill the job requirements" both before and after he was rejected by the defendant].)

Vanderheiden also directs our attention to the deposition testimony of Division Chief Corey Merrick, his direct supervisor from June to November 2003. Although Merrick testified that he could not recall receiving any complaints about Vanderheiden's performance in responding to fires or other emergencies, participating in drills, complying with night watch duties, or dealing with the public, it is also true that he was not questioned about Vanderheiden's teamwork abilities or the specific complaints of his coworkers. While Merrick's testimony may not support Vanderheiden's claim as forcefully as he suggests, it at least raises a factual issue regarding Vanderheiden's ability to perform his job.[21] Merrick also testified that he did not recall anyone reporting that Vanderheiden had threatened them or threatened to harm himself, which tends to contradict the City's claim that other crew members raised safety concerns. In sum, Merrick's deposition testimony contributes to our conclusion that there are legitimate factual disputes underlying Vanderheiden's discriminatory discharge claim.

D. Whether the City's decision that Vanderheiden was "psychologically unable" to perform as a firefighter was "objectively reasonable" is inherently a jury issue.

The parties seem to agree that an employer's conclusion that an employee is incapable of performing his job due to a perceived disability must be "objectively reasonable" to exempt it from liability under section 12940, subdivision (a)(1). "Although an employer is not required to be unfailingly correct in assessing a person's qualifications for a job, [citation] an employer cannot act solely on the basis of subjective beliefs. An unfounded assumption that an applicant is unqualified for a particular job, even if arrived at in good faith, is not sufficient to forestall liability under [the federal

[21] If Vanderheiden were incapable of working on a firefighting team, one might have expected complaints about his performance at fires and other emergencies.

Rehabilitation Act]. [Citations.] The employer's belief must be objectively reasonable." (*Cook v. State of R.I., Dept. of MHRH, supra,* 10 F.3d at pp. 26-27.)[22]

Nor does a medical opinion concluding that the employee is unable to perform the job automatically shield an employer from liability. *Gillen v. Fallon Ambulance Service, Inc., supra,* 283 F.3d 11, was a suit under the ADA and parallel state statute brought by a genetically one-handed applicant who was denied a position as an EMT based on a doctor's conclusion that she would be unable to perform the lifting duties of an EMT. (*Id*. at p. 18.) Reversing summary judgment for the employer, *Gillen* applied an "objectively reasonable" standard to the employer's conclusions about the applicant's inability to perform, including its reliance upon the medical opinion:

"To be sure, obtaining a physician's detailed assessment and then acting in accordance with it can be persuasive evidence that an employer has based its decision on an individualized inquiry into the applicant's capabilities. [Citation.] But a physician's endorsement does not provide complete insulation. An employer cannot evade its obligations under the ADA by contracting out personnel functions to third parties . . . . [¶] The short of it is that a medical opinion is often cogent evidence of nondiscriminatory intent—in some instances, it may even be enough to justify summary judgment [citation]——but the mere obtaining of such an opinion does not automatically absolve the employer from liability under the ADA. Cf. *Bragdon* [*v. Abbott* (1998)] 524 U.S. [624,] 650 (emphasizing that 'courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments'). Thus, an employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions. See *Holiday, supra,* at p. 645 (explaining that '[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective

[22] "Because the ADA and FEHA share the goal of eliminating discrimination, we often look to federal case authority to guide the construction and application of FEHA . . . ." (*Gelfo, supra,* 140 Cal.App.4th at p. 56-57.)

scientific and medical evidence')." (*Gillen, supra,* 283 F.3d at pp. 31-32; see also *Gelfo, supra,* at p. 49, fn. 11.)

An "objectively reasonable" standard by its nature implicates a factual determination warranting a jury trial. "Except where there is no room for a reasonable difference of opinion, the reasonableness of an act or omission is a question of fact, that is, an issue which should be decided by a jury and not on a summary judgment motion." (*Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 966; see also, *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1389, fn. 6 [reasonableness of accommodation generally a fact question]; *Robinson v. City and County of San Francisco* (1974) 41 Cal.App.3d 334, 337 ["Where evidence is fairly subject to more than one interpretation, the question of *reasonableness* is a triable factual issue for the jury to decide"].) Summary judgment was improperly granted on the discriminatory discharge claim.

E. <u>The conduct of other firefighters is relevant to Vanderheiden's claim.</u>

The City and Dr. Everstine relied on Vanderheiden's behavior during the period June through November 2003 in reaching the conclusion that Vanderheiden was psychologically unable to perform as a team member. Yet, the City claims, the conduct of its other firefighters is immaterial and "not relevant." If the City is allowed to rely on reports by other firefighters about Vanderheiden's "problematic and disruptive" behavior, then surely Vanderheiden must be allowed to introduce evidence of his coworkers' behavior toward him during the same period.

Deputy Chief Reilly's description of Vanderheiden's putting other crew members "on notice" to leave him alone may appear somewhat less peculiar in light of Vanderheiden's claim that his locker had been vandalized, his name tags snapped in half, and two homemade bombs planted on his property. Likewise, the City's concern about Vanderheiden's "mood swings," depression, and frustration in the months following the DelBono incident may in part be explained by the workplace environment in which he

was operating.[23] His declaration describes what his attorney calls "a programmatic effort by certain coworkers to undermine his reputation with management by continued refusals to work with him and by selective reports of behavior framed to portray Vanderheiden as emotionally disabled" because Vanderheiden had violated an "implied and twisted code of conduct" within the Department. If a jury believed Vanderheiden's description of the treatment to which he was subjected, it might well conclude that his emotional reaction was understandable—and did not make him psychologically unbalanced or unable to perform as a firefighter. Likewise, his "mood swings" may be explained by his alternating reaction to the crew's ostracism, on the one hand, and his best efforts to continue volunteering for extra work and being friendly to his coworkers, on the other. A jury, too, might view the crying incident more charitably than did the City. No evidence has been presented that the tearfulness occurred more than once.

The City also claims Vanderheiden's evidence regarding his coworkers' conduct is precluded by his deposition testimony that he had no reason to believe that anyone at his station would intentionally misrepresent matters about him to his supervisors. It is true that a party cannot create a material issue of fact in resistance to a summary judgment motion that is directly inconsistent with his deposition testimony. (E.g., *Daddario v. Snow Valley, Inc.* (1995) 36 Cal.App.4th 1325, 1340-1341.) *Daddario* applied that rule where the declaration was "as categorical a contradiction of the [prior deposition testimony] as could be imagined." (36 Cal.App.4th at p. 1341.) However, where the deposition testimony is "neither clear nor unambiguous," that rule is not properly invoked. (*Gillen*, *supra*, 283 F.3d at p. 26.) "A subsequent affidavit that merely explains, or amplifies upon, opaque testimony given in a previous deposition is entitled to consideration in opposition to a motion for summary judgment." (*Ibid*.) The

[23] The City claims evidence of the other firefighters' behavior is irrelevant because this is not a "whistleblower" case under Labor Code, § 1102.5, or an action against the union for breach of the duty of fair representation (§ 3500 et seq.). The fact that coworkers' behavior would be relevant to a different cause of action does not make it irrelevant in the present case.

contradiction must be "clear and unambiguous." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 10.156.10, p. 10.59.)

Although Vanderheiden expressed hopeful belief in the honesty and integrity of his fellow firefighters in his deposition, that does not directly contradict his declaration about their ostracism and hostile conduct. Regardless whether they would "intentionally misrepresent" his behavior to their superiors, a selective reporting of events or shading of the facts by coworkers might have served equally well to convince the City that Vanderheiden was solely to blame for the employee relations problems.

In May 2003, even before Vanderheiden returned to work following the DelBono incident, the City's human resources director expressed to Chief Christiansen her suspicion that Vanderheiden was "laying one on us." Thus, the City may have been predisposed to viewing Vanderheiden as an adversary. By our reading of the record, however, a jury could reasonably conclude that all Vanderheiden ever wanted to do was to return to his job as a fireman.

Vanderheiden's declaration is consistent with his letter to Chief Christiansen in January 2004, which explained that his "isolation" within the fire station was not voluntary, and which reported many of the same incidents described in his declaration. It is disingenuous for the City to suggest that Vanderheiden's claims of harassment by other personnel are recent contrivances, given that the workers' compensation form filled out by Deputy Chief Reilly in September 2004 recites, "Employee claims to be harassed and threatened by fellow employees subsequent to [the DelBono] EMS call numerous times." We perceive no attempt by Vanderheiden to manipulate his testimony in an attempt to create an illusory issue of fact.

If, as Vanderheiden contends, the other crew members refused to work with him because he filed a complaint against DelBono, then that factor will surely be important to the jury in determining whether Vanderheiden, in fact, had a psychological impairment that prevented him from performing as a team member and whether the City's assessment that he was so impaired was objectively reasonable. Ultimately, Vanderheiden claims he was falsely labeled mentally disabled to justify the City's decision to fire him as the

solution to personnel problems that developed in the wake of his going "outside of the department" with his complaint about DelBono. Whether his version of the events is accurate, or whether he really did suffer from an as yet undiagnosed mental disorder that prevented him from participating in a team effort, is to be resolved only by a jury after all of the evidence has been presented.

DISPOSITION

The judgment is reversed as to the discriminatory discharge claim.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.